No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the
United States District Court
for the District of Maryland

REPLY BRIEF FOR APPELLANTS

BRIAN E. FROSH
Attorney General
of Maryland

STEVEN M. SULLIVAN*
Solicitor General
JULIA DOYLE BERNHARDT
Chief of Litigation
200 Saint Paul Place
Baltimore, Maryland 21202
ssullivan@oag.state.md.us
(410) 576-6325

Attorneys for Appellants

*Counsel of Record

SARAH W. RICE
JENNIFER L. KATZ
ANDREA W. TRENTO
Assistant Attorneys General

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

I. THE FIRST AMENDMENT RETALIATION TEST DOES NOT SUPPLY A "LIMITED AND PRECISE" PARTISAN GERRYMANDERING STANDARD.

Plaintiffs' brief sidesteps the central problem identified in the State's opening brief: plaintiffs' proposed test, as adopted by the district court, does not provide a limited, precise, reliably fair, and politically neutral means of determining the line separating "excessive" political considerations from what is constitutionally acceptable. *See Vieth v. Jubelirer*, 541 U.S. 267, 292-93 (2004) (plurality); *id.* at 316 (Kennedy, J., concurring in judgment); *id.* at 365 (Breyer, J., dissenting). Plaintiffs attempt to avoid the issue in five ways. First, they distance themselves from the retaliation theory they advanced below and persuaded the district court to adopt. Second, they propose that the Court treat redistricting legislation as if it were not subject to the same considerations that apply to all other forms of legislation. Third, they advocate subjecting partisan gerrymandering claims to a truncated version of Voting Rights Act, Section 2 analysis. Fourth, they offer unconvincing assurances that the test adopted below will not produce certain undesirable consequences that flow from what the district court has opined and included in its judgment. And fifth, they argue that the voters' adoption of the redistricting plan by referendum should be disregarded. These

arguments fail to rescue their standard from unmanageability.

A. Plaintiffs Concede That Their Test Is Not "Limited and Precise."

1. The plaintiffs confirm that their First Amendment retaliation test is not "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J.). As explained in the State's opening brief at 34-36, it falls to the injury or "burden" element to separate the acceptable from the excessive in redistricting, a task that element cannot accomplish. In their brief, plaintiffs reaffirm that the required showing for their "representational" or vote-dilution injury is no more exacting, nor illuminating, than "some practical difference" to voters as the result of changed district boundaries. Appellees' Br. 38. Plaintiffs also acknowledge that the associational variant of their First Amendment retaliation standard likewise does not purport to provide any "bright line" or "litmus test," *id.* at 40, that could give practical guidance to courts adjudicating partisan gerrymandering claims and to legislators drawing future district maps. They also offer nothing to address the difficulties of measuring and proving causation of alleged harms to voters' interest in voting and political engagement.

But such guidance is necessary to equip courts and legislators to determine, with reliable consistency, the point where a redistricting plan crosses the line between permissible and "excessive" consideration of partisan political goals, and becomes an "unjustified

abuse of partisan boundary-drawing considerations." *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting). This need exists because the Court has not forbidden all consideration of partisan goals in districting. *Id.* at 355; *see also id.* at 359-60 (explaining how the use of political considerations in redistricting can serve "democratic ends"); *id.* at 361 (explaining that "[t]he need for legislative stability cannot justify entrenchment" in power of the minority).

2. Plaintiffs attempt to compensate for the deficiencies of the vote-dilution formulation by proposing an abridged version of the analysis prescribed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for cases under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Appellees' Br. 34-35. Plaintiffs' proposal is ill-considered for two principal reasons. First, the Court adopted the *Gingles* analysis to implement Congressional intent, as revealed in the text of Section 2 and its legislative history, especially factors discussed in the Senate Report accompanying the 1982 amendments to the Act. *See Gingles*, 478 U.S. at 43-44, 47-51. In more than three decades since *Gingles* was decided, the Court has applied the test only to claims brought under Section 2. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413-23, 423-42 (2006) ("*LULAC*") (addressing separately partisan gerrymandering claims and a Section 2 challenge, without suggesting any affinity between the two).

Second, plaintiffs' modified version of *Gingles* uses only its three "preconditions" and omits the factors that comprise *Gingles*' "totality of the circumstances"

component. That component requires a court to "determine whether members of a racial group have less opportunity than do other members of the electorate," by considering factors that include "'the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.'" *LULAC*, 548 U.S. at 425-26 (plurality op.) (citation omitted). These factors go to the "essence" of a Section 2 claim. *Gingles*, 478 U.S. at 47.

Plaintiffs omit the "totality of the circumstances" component, presumably because they are not members of a racial minority with a history of suffering oppression and exclusion from the political process. As plaintiffs themselves acknowledge, merely satisfying the three *Gingles* preconditions, absent consideration of the "totality of the circumstances," does not suffice to establish a vote-dilution claim under Section 2. Appellees' Br. 36 n.5. There is no reason why it should serve to establish a partisan gerrymandering vote-dilution claim under the First Amendment.

3. Plaintiffs suggest reasons why their test might be "limited" in application, but those suggestions do not instill confidence. For example, plaintiffs assert that "[t]he specific intent requirement serves as an important and effective filter against future challenges to redistricting maps under the First Amendment," Appellees' Br. 46, since "any allegation of legislative intent would have to be a plausible one," *id.* at 47 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-82

(2009)). But, as plaintiffs insisted in the previous appeal, "'[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" *Benisek v. Lamone*, No. 17-333, Appellants' Br. 36 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)). Similarly, a majority of justices in *Vieth* agreed that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent." 541 U.S. at 298 (plurality op.); *id.* at 344 (Souter, J., dissenting) (same). Thus, only in the rare case will a court dismiss as not "plausible" an allegation of partisan legislative intent in redistricting. Consequently, the intent element does not promise to make the test a "limited" one.

Plaintiffs also speculate that "it is very unlikely that the specific intent to single out the supporters of a particular political party for disfavored treatment would arise outside of States with single-party control of the governor's mansion and both chambers of the legislature." Appellees' Br. 46-47. That, too, is not much of a filter because today 36 of the 50 states have "single-party control of the governor's mansion and both chambers of the legislature"; in 48 of the 50 states, a single political party controls both houses of the legislature. National Conference of State Legislatures, "State Partisan Composition" (Feb. 4, 2019), available at http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (last visited Mar. 9, 2019).

B. Plaintiffs Cannot Cure Their Standard's Inadequacies by Relabeling It or Conflating It with Other Types of Claims.

In response to the State's showing that a First Amendment retaliation claim is ill-suited for the redistricting context and has no history in challenges to legislation, Appellants' Br. 44-50, plaintiffs deny that their claim involves "retaliation" as such; suggest that redistricting legislation may be treated differently from all other legislation; and invoke case law not involving First Amendment retaliation. These attempts fail to solve the problem of their standard's unsuitability.

Whatever label plaintiffs might prefer, they are unable to cite any case employing the First Amendment retaliation framework to analyze or invalidate legislation. The closest they come is to cite two cases where it was used to address claims against "multimember political bodies similar to legislatures," Appellees' Br. 31 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)), but those decisions, like other First Amendment retaliation cases, involved challenges to actions taken by government in its *executive* capacity, as the employer that terminated the complainants.

Next, plaintiffs suggest that applying the framework to redistricting legislation would not present the same difficulties that have caused courts to avoid applying it to any other legislation. Plaintiffs say that,

unlike other forms of legislation, redistricting "has nothing to do with lawmakers' advancing policies of general application that they and their supporters prefer but their political opponents do not." Appellants' Br. 28. Plaintiffs cite no authority supporting that distinction, which does not withstand scrutiny. This Court's "precedent teaches that redistricting is a legislative function" that "involves lawmaking in its essential features and most important aspect." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668, 2667 (2015). Like other subjects of legislation, redistricting may involve "adopt[ing] and follow[ing] a policy," *Gaffney v. Cummings*, 412 U.S. 735, 738 (1973), and "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," *Perry v. Perez*, 565 U.S. 388, 393 (2012). An adopted "plan reflects the State's policy judgments" on "how to shift existing [district boundaries] in response to . . . population growth." *Id.* As with other types of legislative policy judgments, "various interests compete for recognition" in redistricting, *Miller v. Johnson*, 515 U.S. 900, 914 (1995), and any choice made in map drawing is likely to have its "supporters" and "opponents," Appellees' Br. 28. Therefore, contrary to plaintiffs' suggestion, applying First Amendment retaliation analysis to redistricting legislation raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid.-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other*

grounds by Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015).

Finally, plaintiffs seek to avoid the problems plaguing the First Amendment retaliation test, by relying on cases not involving retaliation. *See, e.g.*, Appellees' Br. 36-37 (discussing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Cook v. Gralike*, 531 U.S. 510 (2001)); *id.* at 39-40 (referencing *Anderson*, *Gralike*, and *Clements v. Fashing*, 457 U.S. 957 (1982)). These cases offer little aid, however, because they involved challenges to measures that, unlike a redistricting plan, expressly imposed direct, tangible burdens on ballot access or participation in the electoral process. Nothing in Maryland's 2011 redistricting legislation imposes any burden on plaintiffs' ability to cast their votes or the ability of their preferred candidates to run for office.

C. Plaintiffs' Test Would Impair States' Ability to Achieve Proportional Representation and Remedy Past Gerrymanders.

Plaintiffs offer assurances that their test permits proportional districting plans and does not privilege the *status quo ante*, but those assurances do not hold up to inspection. Plaintiffs assert that their test would not "necessarily" invalidate a districting map that seeks to achieve proportional representation, Appellees' Br. 44, but what they mean is such maps will not be invalidated if they survive strict scrutiny, which "almost always, results in invalidation," *Vieth*, 541 U.S. at

294 (plurality op.). They further suggest that, under their test, any hope of averting strict scrutiny of "every redistricting map" may necessitate the future establishment of unspecified "safe-harbors." Appellees' Br. 44. But plaintiffs offer no principled reason why those "safe-harbors" would be necessary or justifiable if, as they contend, their test is currently suitable and manageable. Plaintiffs seek to reassure the Court that under the district court's test "the State may continue to use data concerning citizens' voting histories and party affiliations," *id.* at 44, but they cannot account for the district court's judgment prohibiting any consideration of "how citizens are registered to vote or have voted in the past or to what political party they belong," J.S. App. 79a. Taken together, plaintiffs' assertions confirm that their test would preclude proportional maps of the type this Court approved in *Gaffney* and *Easley v. Cromartie*, 532 U.S. 234 (2001).

Plaintiffs also contend that the district court's test does not require reference to the prior district, but in support they merely repeat their abridged *Gingles* formulation, Appellees' Br. 45-46, which the district court did not adopt or reference. Plaintiffs concede that "the focus below was on . . . the immediately prior district," but they insist that it was only to prove that "Republican voters *were* capable of forming the majority of a reasonably drawn district in the area." *Id.* at 46. The record demonstrates otherwise. Plaintiffs' expert used comparisons to the 2002 version of the Sixth District as the "benchmark" to assess the *intent* of the 2011 mapdrawers, J.A. 772, 773; test the extent to which the

2011 district exhibited respect for traditional districting principles, J.A. 775; evaluate alternative plans that were not adopted, J.A. 1088; and demonstrate the merits of the expert's own proposed alternative district, J.A. 776. Plaintiffs offer nothing to contradict the district court's reliance on the prior district as the measure for the First Amendment violations found. *See* J.S. App. 53a-54a, 61a-63a, 73a-75a. Nor have they refuted the likely consequence: the district court's test would impair states' ability to cure a previous gerrymander.

Nor do plaintiffs even attempt to refute the result their standard would yield whenever legislators faced a choice between equally commendable maps, one favoring the majority party and the other favoring the minority party. *See* Appellants' Br. 42-43 (citing *Benisek v. Lamone*, No. 17-333, oral argument Tr. 14-15 (Justice Alito's hypothetical question)). Evidently, plaintiffs concede that their standard would compel legislators to choose the map favoring the minority party, lest the redistricting plan be found to violate some voters' representational or associational rights. They do not deny that their standard would give rise to competing and contradictory claims of partisan gerrymandering if a redistricting plan changed the political orientation of some districts from Democratic to Republican and flipped other districts in the opposite direction. *See* Appellants' Br. 42.

D. Plaintiffs' Test Fails to Account for the People's Adoption of the Redistricting Plan in the Referendum.

Plaintiffs do not acknowledge that the challenged redistricting legislation was "adopted by the people," Md. Const. art. XVI, § 5(b), by overwhelming vote. But this Court has long recognized "'the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws.'" *Arizona State Legislature*, 135 S. Ct. at 2666 (quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916)); *see id.* at 2668 ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum[.]"). If a partisan gerrymandering standard includes an element of legislative intent, as the plaintiffs' does, then it can hardly constitute a valid analysis if it fails to consider the intent of the people who adopted the redistricting legislation in the referendum. Yet, the plaintiffs' test, adopted by the district court, does not consider the referendum at all.

Plaintiffs argue that "[i]t would not cure an Equal Protection violation to ratify a racial gerrymander in a statewide referendum," Appellees' Br. 33, but they are not asserting an equal protection violation or a racial gerrymandering claim. They are maintaining a First Amendment partisan gerrymandering claim that purports to remedy a "practice [that] enables politicians to entrench themselves in power against the people's will." *Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring). The test for adjudicating such a

claim cannot be limited, precise, clear, manageable, politically neutral, and reliably fair if it fails to acknowledge the "people's will," as expressed by more than 1.5 million votes cast in the referendum. The First Amendment retaliation test here fails to account for the referendum at all and, as explained previously, is incapable of doing so. Appellants' Br. 48-50.

Unable to explain how their theory works in light of the referendum, plaintiffs choose to malign its validity. They suggest that there is some question "whether, as a factual matter, voters *actually* understood what they were being asked to approve," Appellees' Br. 34. But plaintiffs did not seek to litigate that question below. *See* Dkt. 1, 11, 44, 177-1. A court cannot assume that more than 1.5 million voters misunderstood what they were doing when they voted in favor of the redistricting plan.

This Court has rejected reliance on a mere "possibility that voters will be confused as to the meaning of" what appears on the ballot. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454 (2008). Absent proof, an "assertion that voters will misinterpret" the ballot "is sheer speculation" that "'depends upon the belief that voters can be "misled,"'" whereas this Court's "'cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'" *Id.* (citations omitted). This Court presumes "the vast majority of the electorate not only is literate but is informed on a day-to-day basis about events and issues that affect election choices." *Anderson*, 460 U.S. at 797. The Court has also

recognized that "explanatory materials mailed to voters," such as explanatory notices that were mailed to each registered Maryland voter prior to the 2012 referendum pursuant to statute, Md. Code Ann., Elec. Law § 7-105(b), constitute measures that "eliminate any real threat of voter confusion." *Washington State Grange*, 552 U.S. at 456. As in *Washington State Grange*, plaintiffs' attempt to denigrate the referendum "rests on factual assumptions about voter confusion" and "fails for the same reason: In the absence of evidence, we cannot assume that [a state's] voters will be misled." 552 U.S. at 457.

The only "evidence" of voter confusion cited by plaintiffs is an answer to a question posed to the State's expert witness, Dr. Allan Lichtman, more than 4½ years after the referendum vote, Appellees' Br. 34, but the question did not mention that it was about the referendum. Instead, plaintiffs' counsel presented what the attorney described as "one page with one sentence," without indicating that it was the ballot language for the referendum, and asked the witness if he "recognized the sentence." Dkt. 177-49, Tr. 174:16-17. Understandably, the witness answered, "I have no idea what it is. It seems to be sitting in isolation." Tr. 20-21. Later in the deposition, when asked whether the manner of the referendum question's presentation on the ballot "present[ed] any problem," Tr. 178:14-15, Dr. Lichtman answered, "No, this was all over the press. It was a big issue. And, certainly, if people believed that they were being retaliated against for their political views, this was quite a unique and clear forum to

express that." Tr. 178:18-179:1. This testimony is by no means evidence of voter confusion about the 2012 referendum.

II. The District Court Failed to Adhere to the Requirements for Deciding Motions for Summary Judgment.

The district court's disposition of the parties' cross-motions for summary judgment involved more serious departures from the summary judgment standard than those that required both reversal of the ruling on cross-motions for summary judgment and remand for trial in *Hunt v. Cromartie*, 526 U.S. 541 (1999). *See* Appellants' Br. 50-58. Plaintiffs do not acknowledge *Hunt* but, instead, offer three sets of counterarguments, each erroneous. First, they argue that the State's pursuit of a cross-motion for summary judgment constituted a waiver of trial, Appellees' Br. 48-50, a notion that contradicts this Court's resolution of *Hunt* and its ensuing trial. *See Easley*, 532 U.S. 234. Second, they argue that there are no genuine issues of material fact, Appellees' Br. 50-52, but their argument depends on discounting, disbelieving, or disregarding altogether evidence and inferences favoring the State, which a court may not do, as explained in *Hunt*. Finally, plaintiffs argue, based on inapposite lower court decisions, that the district court was free to rely upon, and treat as "undisputed," evidence that was subject to unaddressed evidentiary objections, and that, in any case, the evidence was unobjectionable. Appellees' Br. 52-54. This Court should reject all of their arguments.

A. A Cross-Motion for Summary Judgment Is Not a Waiver of Trial.

Plaintiffs argue that "the State has waived [the] argument" that the district court "improperly 'resolve[ed] disputed facts pertaining to multiple elements of plaintiffs' claims,'" "by not raising it below" and because the cross-motion for summary judgment "did not oppose [plaintiffs'] motion for summary judgment by asserting that there were genuine disputes necessitating a trial." Appellees' Br. 48. Their argument misunderstands both the nature of an appeal and the nature of a cross-motion for summary judgment.

A motion for summary judgment "is not a waiver of the movant's right to a trial—or to argue that factual disputes warrant a trial—in the event the court finds the motion wanting," and "[i]t is not a concession that the same facts might warrant judgment against the movant, or that the movant could marshal no additional evidence or arguments in opposition to the prospect of such an adverse judgment." *Hotel 71 Mezz Lender LLC v. National Ret. Fund*, 778 F.3d 593, 602, 603 (7th Cir. 2015) (citations omitted). "[D]enying the motion normally will leave the movant in essentially the same position, procedurally, that it would have been in had it not requested summary judgment in the first instance." *Id.* at 603. "The principle is the same if both parties move for summary judgment." *Market Street Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991).

As previously explained, Br. in Opp. to Motion to Affirm 11-13, plaintiffs are also wrong in suggesting that the cross-motions should be treated as the equivalent of "submission of the dispute as a 'case ready for decision on the merits,'" Appellees' Br. 49. "The filing of cross motions for summary judgment must be distinguished from the case in which the parties stipulate that the judge may enter final judgment on the record compiled in the summary judgment proceedings." *Market Street Assocs.*, 941 F.2d at 590 (citing cases). Though some appellate courts have opined that, in the absence of such a stipulation, a submission of the case for judgment on the papers may be inferred from the record, "[w]hen determining whether this was the path taken by the parties in non-jury cases," the court must "inquire into the intentions of the parties and the district court judge, as evidenced by the record on appeal." *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 644 (1st Cir. 2000) (citing cases from other circuits). Here the record discloses no such intention. *See* Br. in Opp. to Motion to Affirm 12-13. Plaintiffs' argument that such an intent can be inferred from an agreement to forgo an evidentiary hearing at the preliminary injunction stage, Appellees' Br. 50, misunderstands a preliminary injunction motion. Because the movant bears the burden of presenting evidence sufficient to satisfy the four factors of the preliminary injunction standard, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), it is generally in only the *movant*'s interest to request an evidentiary hearing. Forgoing the typically abbreviated evidentiary hearing on a

motion for preliminary injunction cannot constitute a waiver of trial.

B. Genuine Disputes of Material Fact Preclude Granting Summary Judgment to Plaintiffs.

The lengths to which plaintiffs go to characterize the record as containing no material disputes of fact demonstrate that they, like the district court, fail to abide by this Court's teachings in *Hunt*.[1] When plaintiffs claim there is "no evidence" to contradict their positions, what they mean is that there *is* such evidence, but they and the district court prefer to disregard it, treat it as not credible, assign it less weight, or refuse to draw from it a reasonable inference that would favor the State. But none of those options are available to a court adjudicating a motion for summary judgment. *Hunt*, 526 U.S. at 552.

Perhaps the best illustration is plaintiffs' insistence that "there is literally no evidence to support" the conclusion that the configuration of the Sixth District was "solely" driven by the State's interest in having the "I-270 corridor economic region" represented in a

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[1] Plaintiffs have no support in the record; they assert that the State "admitted" that "Republican voters suffered a 'disadvantage in the ability to elect a candidate of [their choice],'" Appellees' Br. 48-49 (citing Dkt. 186-1 at 39), but the supposed "admission" they quote is merely a description of what *plaintiffs* allege.

single district.[2] Appellees' Br. 51. First, no factor "solely" accounts for the district's boundaries; rather, changes elsewhere in Maryland had a profound impact on the drawing of the Sixth District. *See* Appellants' Br. 11-12, 14. For example, eliminating the Bay Bridge crossing necessitated extending the northern part of the First District westward into areas formerly within the Sixth District. However, the record undeniably shows that voters who attended the GRAC's public hearings expressed the importance of the I-270 corridor, J.A. 845-47, as did contemporaneous reports in media coverage of the redistricting process, J.A. 847; those concerns were heeded by map-drawers, J.A. 938; 710-11. Other sources unconnected to redistricting and this litigation establish that the I-270 Corridor "provides an essential connection between the Washington, DC metropolitan area and central and western Maryland." J.A. 838. Moreover, demographic changes in the two counties connected by I-270, Montgomery and Frederick, made it inevitable that district "borders would change the most out that 270 Corridor." J.A. 40 (O'Malley). In the decade prior to the 2010 Census, Montgomery County experienced the most growth of any county, in absolute numbers, with an increase of 98,436 people, to reach a total population of 971,777.[3] Neighboring

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[2] Plaintiffs claim that "the I-270 story is simply implausible," Appellees' Br. 15, but for that proposition they cite only the report of their expert, Dr. Morrison, J.A. 805-09, which is analyzed and refuted in the report of the State's expert, Dr. Lichtman, J.A. 836-48.

[3] *See* Population Change for Counties in the United States and for Municipios in Puerto Rico: 2000 to 2010 (CPH-T-1),

Frederick County experienced a greater percentage growth, an increase of 19.5%, to reach a total population of 233,385.[4] In light of this evidence, the district court's suggestion that the importance of the I-270 Corridor was only "a post-hoc rationalization," having "utter implausibility," J.S. App. 55a, demonstrates that the court impermissibly "credited appellees' asserted inferences over those advanced and supported by appellants." *Hunt*, 526 U.S. at 552.

C. The District Court Impermissibly Relied on Evidence Subject to Unresolved Objections.

No case cited by plaintiffs, Appellees' Br. 52, contradicts the requirement that "[b]efore ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). Instead, the cited cases differ considerably from the circumstances here. *Fielding v. Tollaksen*, 510 F.3d 175 (2d Cir. 2007), did not involve an evidentiary objection. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111 (10th Cir. 2004), concerned a Rule 56(f) motion for continuance to pursue discovery before responding to motions for summary judgment. In *Major League Baseball Properties, Inc. v. Salvino Inc.*, 542 F.3d 290, 312, 314 (2d Cir. 2008), the appellate

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https://www.census.gov/data/tables/time-series/dec/cph-series/cph-t/cph-t-1.html (last visited Mar. 14, 2019).

[4] *Id.*

court found no genuine issue of material fact because, unlike here, the defendant's evidentiary objections conceded that the facts contained in the pertinent records were undisputed. These cases do not excuse the district court's reliance on disputed material evidence, including lay opinion testimony, without ruling on objections to admissibility.

Plaintiffs suggest that their descriptions of unidentified persons' out-of-court statements were not offered to establish the truth of the matter asserted, because the statements merely expressed voter sentiment, or state of mind. But declarants' statements about sentiment would be relevant only to show *why* those declarants felt as they purportedly did. The "'state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind.'" *United States v. Samaniego*, 345 F.3d 1280, 1282 (11th Cir. 2003).

Plaintiffs do not address all of the grounds for the State's objections regarding campaign finance reports analyzed in attorney Micah Stein's declaration. Comparison of the Stein declaration (J.A. 1206-16) with the underlying data he analyzed shows why the matter cries out for expert testimony about its adequacy. For example, plaintiffs rely on his aggregated totals for the three counties he analyzed—Garrett, Washington, and Allegany—for the proposition that post-redistricting fundraising, as measured by Republican Central Committee receipts, fell during "midterm election years" by

more than 12%, and "during presidential election years" by over 6%. Appellees' Br. 13 (citing J.A. 1216).

The per-county, disaggregated data, contained in an exhibit (Dkt. 210-14), tells a different story: In Garrett County, total receipts did not fall, but *increased*, each election cycle from pre-redistricting 2010 ($6,671) to post-redistricting 2012 ($7,237) to 2014 ($8,114). In Washington County, total receipts fell between 2010 ($21,175) and 2012 ($11,228), but then rebounded again in 2014 ($20,228) to regain almost the same level as 2010 and far higher than 2008 ($14,615). In Allegany County, total receipts for the pre-redistricting 2010 cycle ($11,541) and post-redistricting 2012 ($11,052), differed by less than $500. Dkt. 210-14, 2. In Frederick County, omitted from Mr. Stein's analysis, receipts by the Republican Central Committee for 2012 ($23,831) and 2014 ($21,404) exceeded the total receipts for each of the pre-redistricting cycles of 2010 ($10,940) and 2008 ($19,187). Receipts more than doubled between 2010 and the first post-redistricting election in 2012.[6] These per-county numbers indicate there is fair ground for disagreement about what, if any, meaning can be ascribed to the campaign finance report information.

Plaintiffs also continue to rely on impermissible lay opinion testimony, including a chart, developed by

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[6] Frederick County Republican Central Committee Campaign Reports, MARYLAND CAMPAIGN REPORTING INFORMATION SYSTEM, https://campaignfinance.maryland.gov/Public/ViewFiledReports (search Committee Type Party Central Committee, Candidate/Committee Name Frederick and select Years 2008 through 2014).

Mr. Stein, Appellees' Br. 10, that purports to compare voting results among precincts that were allegedly retained, removed, or added to the Sixth District, an analysis that requires manipulation of precinct and partial precinct data in ways beyond a layperson's abilities. Plaintiffs do not explain why this evidence was appropriate for consideration by the district court, nor why it is appropriate for this Court's consideration. Appellees' Br. 52-54. The plaintiffs' only defense of their reliance on this inadmissible evidence, *see* Fed. R. Evid. 702 (J.A. 1249-50; *see also* Dkt. 215-1), is to suggest that the State should have disregarded the district court's scheduling order and submitted uncontemplated further evidentiary briefing. Appellees' Br. 18. But plaintiffs cannot seriously contend that, by moving to exclude inadmissible lay opinion testimony first offered more than a year after expert discovery had closed, the State somehow forfeited its opportunity to counter that testimony. *Compare* Dkt. 180 (expert discovery closed June 5, 2017) *with* J.A. 1216 (Stein Affidavit dated July 3, 2018).

III. Equitable Principles and the Public Interest Preclude Injunctive Relief.

1. Plaintiffs' own brief demonstrates how the State has suffered prejudice from the plaintiffs' "years-long delay." *Benisek v. Lamone*, 138 S. Ct. at 1944. Like statutes of limitations, laches is associated with three forms of prejudice: "'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Midland Funding, LLC v. Johnson*, 137 S. Ct.

1407, 1418-19 (2017) (Sotomayor, J., dissenting) (citation omitted). Plaintiffs' delay in bringing their November 2013 suit and then in ultimately amending their complaint to add their First Amendment retaliation claim in March 2016—4½ years after enactment of the 2011 redistricting legislation—has resulted in lost evidence, faded memories, and the loss of state witnesses to other employment.

Prior to the 2016 amended complaint, plaintiffs had disavowed any reliance "on the reason or intent of the legislature—partisan or otherwise." Dkt. 11 ¶ 2. Consequently, officials and legislators were not on notice of any need to preserve records related to legislative intent. Dkt. 186-1, 50. Governor O'Malley left office in January 2015. Dkt. 186-1, 50. Due to the change of administration, many state personnel who had been involved in redistricting left state service. *Id.* By the time plaintiffs undertook discovery after the 2016 amended complaint, officials were asked in depositions to recall details of events that had occurred, in some instances, nearly six years before. *Id.* at 49. They struggled at times to do so. *See, e.g.*, J.A. 197, 198, 199 (Miller); Dkt. 177-8, Tr. 123-24 (Hitchcock).

Plaintiffs have repeatedly sought to capitalize on the lack of documentation and faded memories, both in their summary judgment briefing, *see, e.g.*, 177-1, 5-6 (noting Jeanne Hitchcock's failure to recall), and before this Court. When they claim that "there is no evidence that any relevant public comments were actually taken into account by the mapdrawers," Appellees' Br. 4, they are relying on both the lack of documents and

faded memories. For example, former GRAC member Jeanne Hitchcock could recall that GRAC's map "reflected what we heard" from members of the public who attended GRAC's hearings, but when asked about specific alterations made in response to that input, she did not "have a recollection of that specifically." Dkt. 177-8, Tr. 124:4-6, 123:4-5. Plaintiffs compound the prejudice by disregarding testimony of witnesses who did recall events. For example, Yaakov Weissmann, a Maryland legislative staffer tasked with drafting the 2011 redistricting map, testified via declaration that he worked directly with members of the GRAC and attended public hearings, and that former GRAC member Jeanne Hitchcock "would join [the staff] workgroup [drawing the map] to provide feedback, including feedback from the public hearings and other stakeholders."[6] J.A. 937, ¶ 7. Plaintiffs chose not to depose Mr. Weissmann. Instead, plaintiffs preferred to

[6] Plaintiffs attempt to tie Mr. Weissmann to Eric Hawkins, a contractor hired by the Congressional delegation. Appellees' Br. 5. But there is no evidence that Mr. Hawkins ever worked on the adopted Maryland map. Maryland mapdrawers and decisionmakers rejected the Congressional delegation's proposed map. J.A. 937, ¶¶ 8, 9. The two e-mails plaintiffs cite, Appellees' Br. 5 (citing J.A. 823, 825), establish no such connection. They are unrelated exchanges between Mr. Hawkins and Jason Gleason, chief of staff to Representative John Sarbanes. *See also Benisek v. Lamone*, No. 17-333, Appellees' Br. 14 n.10. The only correspondence in the record involving both Mr. Weissmann and Mr. Hawkins (J.A. 1104) shows Mr. Weismann responding to a query from someone else, forwarding a question by Mr. Hawkins. The email exchange concerns only minor adjustments made *after* the GRAC and state workgroup had introduced the plan to the public. J.A. 1104 (dated October 18, 2011, after plan was introduced); *see also* Appellees' Br. 11.

rely on the dearth of surviving documentation and the inability of some witnesses to recall the details of what occurred some half-dozen years earlier.

2. Though plaintiffs claim that courts "often" order a new redistricting map at the end of a decade before an impending census, they cite only three cases, one of which is *Rucho*, No. 18-422, now pending on appeal. Appellees' Br. 55 (citing *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017), *rev'd in part*, 138 S. Ct. 2305 (2018); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y.), *aff'd*, 522 U.S. 801 (1997). None of them involved a finding of "plaintiffs' unnecessary, years-long delay," as here, *Benisek v. Lamone*, 138 U.S. at 1944; and none of them involved enjoining a plan that had been used in four prior Congressional elections, as Maryland's 2011 plan has been. In *Perez*, there had been two prior elections under the enjoined plan. 138 S. Ct. at 2318. In both *Perez* and *Diaz*, the injunction was entered three years before the next census. *Id.*; 978 F. Supp. 96.

CONCLUSION

The Court should reverse and vacate the judgment of the United States District Court for the District of Maryland.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN*
Solicitor General
JULIA DOYLE BERNHARDT
Chief of Litigation
SARAH W. RICE
JENNIFER L. KATZ
ANDREA W. TRENTO
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
ssullivan@oag.state.md.us
(410) 576-6325

Attorneys for Appellants

Counsel of Record